United States Court of Appeals

for the Second Circuit

APPENDIX

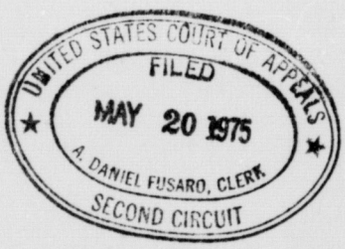
No. 75-4044

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES K. STERRITT, INC., AND CONCRETE HAULERS, INC.,	:
Petitioner,	:
v.	:
NATIONAL LABOR RELATIONS BOARD,	:
Respondent.	:

JOINT APPENDIX - VOL. I



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PAGINATION AS IN ORIGINAL COPY

VOLUME I.
TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: James K. Sterritt, Inc., and Concrete Haulers, Inc.,

Board Case Nos.: 3-CA-5580-1, 3-CA-5580-2, 3-CA-5580-3, 3-CA-5580-4, 3-CA-5580-5, 3-CA-5580-6 & 3-CA-5580-7

2.20.74 Charge filed in Case No. 3-CA-5580-1

2.20.74 Charge filed in Case No. 3-CA-5580-2

2.20.74 Charge filed in Case No. 3-CA-5580-3

2.20.74 Charge filed in Case No. 3-CA-5580-4

2.20.74 Charge filed in Case No. 3-CA-5580-5

2.25.74 Charge filed in Case No. 3-CA-5580-6

2.25.74 Charge filed in Case No. 3-CA-5580-7

4.23.74 Amended Charge filed in Case No. 3-CA-5580-1

4.23.74 Amended Charge filed in Case No. 3-CA-5580-2

4.23.74 Amended Charge filed in Case No. 3-CA-5580-3

4.23.74 Amended Charge filed in Case No. 3-CA-5580-4

4.23.74 Amended Charge filed in Case No. 3-CA-5580-5

4.25.74 Amended Charge filed in Case No. 3-CA-5580-6

4.25.74 Amended Charge filed in Case No. 3-CA-5580-7

4.30.74 Order Consolidating Cases, Complaint and Notice of Hearing, dated

5.14.74 Answer to Consolidated Complaint, dated

5.28.74 Notice of Intention to Amend Consolidated Complaint, dated

6. 4.74 Hearing opened

6.11.74 Hearing closed

7.12.74 Petitioner's Motion to Correct the Official Report of Proceedings, dated

8.12.74 Administrative Law Judge's Decision issued

9.11.74 Petitioner's Exceptions to Decision of the Administrative Law Judge, received

12.16.74 Board's Decision and Order, dated

1.28.75 Board's Order Correcting Decision and Order, dated

FORM NLRB-501
(2-67)

Form Approved
Budget Bureau No. 64-R001.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 3-CA-5580-1

Date Filed February 20, 1974

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: James K. Sterritt, Inc.

b. Number of Workers Employed: 15

c. Address of Establishment (Street and number, city, State, and ZIP code): Box 367, W. Coxsackie, New York 12051

d. Employer Representative to Contact: James K. Sterritt

e. Phone No.: 731-8116

f. Type of Establishment (Factory, mine, wholesaler, etc.): Trucking Terminal

g. Identify Principal Product or Service: Freight Hauling

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about January 18, 1974, it, by its officers, agents, and representatives, terminated the employment of Allen Finch, a driver, because of his membership and activities in behalf of Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization, and at all times since such date it has refused and does now refuse to employ the above-named employee.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Allen Finch

4a. Address (Street and number, city, State, and ZIP code): 33 Layfayette Ave., Coxsackie, New York 12051

4b. Telephone No.: 731-6452

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Allen Finch
(Signature of representative or person filing charge)

An Individual
(Title, if any)

Address 33 Layfayette Ave., Coxsackie, NY 12051

731-6452
(Telephone number)

February 20, 1974
(Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

☆ GPO 473-109

(2-67)

Form Approved
Budget Bureau No. 64-R001.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.	DO NOT WRITE IN THIS SPACE Case No. 3-CA-5580-1 Date Filed April 23, 1974

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer	b. Number of Workers Employed
James K. Sterritt, Inc. and Concrete Haulers Inc.	20

c. Address of Establishment (Street and number, city, State, and ZIP code)	d. Employer Representative to Contact	e. Phone No.
Box 367, W. Coxsackie, New York 12051	James K. Sterritt	731-8116

f. Type of Establishment (Factory, mine, wholesaler, etc.)	g. Identify Principal Product or Service
Trucking Terminal	Freight Hauling

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about January 18, 1974, it, by its officers, agents and representatives, terminated the employment Allen Finch, a driver, because of his membership and activities in behalf of Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization, and at all times since said date, it has refused and failed to recall and reinstate the above-named employee.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Allen Finch

4a. Address (Street and number, city, State, and ZIP code)	4b. Telephone No.
33 Layfayette Ave., Coxsackie, New York 12051	731-6452

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Allen Finch (Signature of representative or person filing charge) An Individual (Title, if any)

Address 33 Layfayette Ave., Coxsackie, NY 12051 731-6452 (Telephone number) April 23-1974 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

☆ GPO 473-109

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

JAMES K. STERRITT, INC. and CONCRETE HAULERS INC.	
and	
ALLEN FINCH, AN INDIVIDUAL	CASE NO. 3-CA-5580-1
and	
ALBERT QUICK, SR., AN INDIVIDUAL	CASE NO. 3-CA-5580-2
and	
FRANK K. RUHNKE, AN INDIVIDUAL	CASE NO. 3-CA-5580-3
and	
THOMAS F. MONTEVERDE, JR., AN INDIVIDUAL	CASE NO. 3-CA-5580-4
and	
ROBERT QUICK, AN INDIVIDUAL	CASE NO. 3-CA-5580-5
and	
EDWARD JORDAN, JR., AN INDIVIDUAL	CASE NO. 3-CA-5580-6
and	
PAUL D. OVERBAUGH, AN INDIVIDUAL	CASE NO. 3-CA-5580-7

ORDER CONSOLIDATING CASES,
COMPLAINT AND NOTICE OF HEARING

It having been charged in Case No. 3-CA-5580-1 by Allen Finch, herein called Finch; Case No. 3-CA-5580-2 by Albert Quick, Sr., herein called Quick, Sr.; Case No. 3-CA-5580-3 by Frank K. Ruhnke, herein called Ruhnke; Case No. 3-CA-5580-4 by Thomas F. Monteverde, Jr., herein called Monteverde, Jr.; Case No. 3-CA-5580-5 by Robert Quick, herein called Quick; Case No. 3-CA-5580-6 by Edward Jordan, Jr., herein called Jordan, Jr.; and in Case No. 3-CA-5580-7 by Paul D. Overbaugh, herein called Overbaugh, that James K. Sterritt, Inc., herein referred to as Respondent JKS, Inc., and Concrete Haulers Inc., herein referred to as Respondent CHI, and referred to collectively as Respondent, have engaged in, and are engaging in certain unfair labor practices affecting commerce as set forth and defined in the National

Labor Relations Act, as amended 29 U.S.C. Sec. 151, et. seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for the Third Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations - Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

I

(a) The original charge in Case No. 3-CA-5580-1 was filed by Finch on February 20, 1974, and served on Respondent JKS Inc. by registered mail on or about February 20, 1974.

(b) The amended charge in Case No. 3-CA-5580-1 was filed by Finch on April 23, 1974, and served on Respondent by registered mail on or about April 23, 1974.

(c) The original charge in Case No. 3-CA-5580-2 was filed by Quick, Sr., on February 20, 1974, and served on Respondent JKS Inc. by registered mail on or about February 20, 1974.

(d) The amended charge in Case No. 3-CA-5580-2 was filed by Quick, Sr., on April 23, 1974, and served on Respondent by registered mail on or about April 23, 1974.

(e) The original charge in Case No. 3-CA-5580-3 was filed by Ruhnke on February 20, 1974, and served on Respondent JKS Inc. by registered mail on or about February 20, 1974.

(f) The amended charge in Case No. 3-CA-5580-3 was filed by Ruhnke on April 23, 1974, and served on Respondent by registered mail on or about April 23, 1974.

(g) The original charge in Case No. 3-CA-5580-4 was filed by Monteverde, Jr. on February 20, 1974, and served on Respondent JKS Inc. by registered mail on

or about February 20, 1974.

(h) The amended charge in Case No. 3-CA-5580-4 was filed by Monteverde, Jr. on April 23, 1974, and served on Respondent by registered mail on or about April 23, 1974.

(i) The original charge in Case No. 3-CA-5580-5 was filed by Quick on February 20, 1974, and served on Respondent JKS Inc. by registered mail on or about February 20, 1974.

(j) The amended charge in Case No. 3-CA-5580-5 was filed by Quick on April 23, 1974, and served on Respondent by registered mail on or about April 23, 1974.

(k) The original charge in Case No. 3-CA-5580-6 was filed by Jordan, Jr. on February 25, 1974, and served on Respondent JKS Inc. by registered mail on or about February 25, 1974.

(l) The amended charge in Case No. 3-CA-5580-6 was filed by Jordan, Jr. on April 25, 1974, and served on Respondent by registered mail on or about April 25, 1974.

(m) The original charge in Case No. 3-CA-5580-7 was filed by Overbaugh on February 25, 1974, and served on Respondent JKS Inc. by registered mail on or about February 25, 1974.

(n) The amended charge in Case No. 3-CA-5580-7 was filed by Overbaugh on April 25, 1974, and served on Respondent by registered mail on or about April 25, 1974.

II

(a) Respondent JKS Inc. has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) Respondent CHI, is and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware.

(c) At all times material herein, Respondent JKS, Inc., has maintained its principal office and place of business at Scheller Park Road, in the City of New Baltimore, and State of New York, herein called the Scheller Park facility, and is, and has been at all times material herein, engaged at said facility and location in the operation of a trucking terminal and in the transportation

of prestressed and precast concrete forms by virtue of contractual agreements with concrete manufacturers such as Spancrete Northeast.

(d) Since on or about February 1, 1974, Respondent JKS, Inc. has ceased operation, and since on or about February 1, 1974, and at all times material herein, Respondent CHI has operated said Scheller Park facility, and has engaged in the same business operations formerly engaged in by Respondent JKS, Inc., has utilized the Scheller Park facility formerly operated by Respondent JKS, Inc., purchased the power equipment formerly owned by Respondent JKS, Inc., and has employed substantially the same employees and supervisors as had been employed by Respondent JKS, Inc. Respondent CHI has at all times since on or about February, 1974, been an alter ego of Respondent JKS, Inc.

(e) During the past year Respondent JKS, Inc., in the course and conduct of its business operations, performed services valued in excess of $50,000 of which services valued in excess of $50,000 were performed for Spancrete Northeast, which enterprise annually produces and ships goods valued in excess of $50,000 directly to states of the United States other than the State of New York wherein Spancrete Northeast is located.

(f) Since on or about February 1, 1974, Respondent CHI, in the course and conduct of its business operations, has performed services the value of which, on a 12-month projected basis, will exceed $50,000, and of which services valued in excess of $50,000 are expected to, and will be, performed for Spancrete Northeast, which enterprise annually produces and ships goods valued in excess of $50,000 directly to states of the United States other than the State of New York wherein Spancrete Northeast is located.

III

Respondents JKS, Inc. and CHI, are now and have been at all times material herein, individually and collectively an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV

Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

V

At all times material herein, the following-named person occupied the position set opposite his name, and has been and is now an agent of Respondent JKS, Inc., and Respondent CHI, at the Scheller Park facility, acting on its behalf, and is a supervisor within the meaning of Section 2(11) of the Act:

James K. Sterritt	-	General Manager of Respondent CHI, President of Respondent JKS, Inc.

D VI

(a) On or about early December, 1973, Respondent by its agent and supervisor James K. Sterritt, at its Scheller Park facility on two occasions threatened its employees with discharge or other reprisals because they accepted benefits accruing from a collective bargaining agreement between Respondent JKS, Inc. and the Union.

(b) On or about mid-January, 1974, Respondent, by its agent and supervisor James K. Sterritt, during a telephone conversation, threatened an employee that other employees would lose their jobs because of the employee's union activities.

A VII

Respondent did terminate the following employees employed at the Scheller Park facility on or about the dates set opposite their respective names:

Quick, Sr.	-	January 11, 1974
Ruhnke	-	January 11, 1974
Overbaugh	-	January 16, 1974
Finch	-	January 18, 1974
Jordan	-	January 19, 1974
Quick	-	January 23, 1974
Monteverde, Jr.	-	January 25, 1974

D VIII

Since the dates of the terminations referred to above in paragraph VII, Respondent has failed and refused, and continues to fail and refuse, to recall or reemploy said employees to their former or substantially equivalent positions of employment.

D IX

Respondent terminated and failed and refused and continues to fail and refuse to recall and/or reemploy the employees referred to and/or named above in paragraphs VII and VIII, above because said employees joined or assisted the Union or engaged

in other union activity or concerted activities for the purpose of collective bargaining or mutual aid or protection.

D X

By the acts described above in paragraphs VI, VII, VIII, and IX, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

D ~~IX~~ XI

By the acts described above in paragraphs VII, VIII, and IX, and by each of said acts, Respondent did discriminate, and is discriminating, in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

D XII

The acts of Respondent described in paragraphs VI, VII, VIII and IX, above, occurring in connection with the operations of Respondent described in paragraphs II, and III, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

D XIII

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 4th day of June 1974, and consecutive days thereafter until concluded, at 10:00 a.m. EDST, at the Albany Resident Office, National Labor Relations Board, The Standard Building, 11th Floor, 112 State Street, Albany, New York 12207, a hearing will be conducted before a

[- 7 -]

duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Consolidated Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED at Buffalo, New York, this 30th day of April, 1974.

THOMAS W. SEELER, Regional Director
National Labor Relations Board - Region 3
The Federal Building - 9th Floor
111 West Huron Street
Buffalo, New York 14202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

JAMES K. STERRITT, INC. and
CONCRETE HAULERS INC.

and

ALLEN FINCH, AN INDIVIDUAL — CASE NO. 3-CA-5580-1

and

ALBERT QUICK, SR., AN INDIVIDUAL — CASE NO. 3-CA-5580-2

and

FRANK K. RUHNKE, AN INDIVIDUAL — CASE NO. 3-CA-5580-3

and

THOMAS F. MONTEVERDE, JR., AN INDIVIDUAL — CASE NO. 3-CA-5580-4

and

ROBERT QUICK, AN INDIVIDUAL — CASE NO. 3-CA-5580-5

and

EDWARD JORDAN, JR., AN INDIVIDUAL — CASE NO. 3-CA-5580-6

and

PAUL D. OVERBAUGH, AN INDIVIDUAL — CASE NO. 3-CA-5580-7

ANSWER TO CONSOLIDATED COMPLAINT

JAMES K. STERRITT, INC. and CONCRETE HAULERS INC., by and through their attorneys, McGinn, Malderry and Buckley, Esqs. and Alfred C. Purello, Esq., and for an answer to the consolidated complaint heretofore issued in this proceeding:

1. Admit the allegations of Paragraph I, II(a) and II(b) of said complaint.

2. Respondent JKS Inc. admits the allegations of Paragraph II(c) of said complaint except that it denies that it has engaged in the transportation of precast and prestressed concrete forms.

3. Admit the allegations of Paragraph II(d) of said complaint except that they deny that respondent CHI purchased all of the power equipment formerly owned by JKS Inc., and has employed substantially the same employees and supervisors as had been employed by respondent JKS Inc. and they further deny that respondent CHI has at any time been an alter ego of respondent JKS Inc.

4. Deny the allegations of Paragraphs II(e) and II(f) of said complaint.

5. Admit the allegations of Paragraph III of said complaint except deny that respondents have ever collectively been an employer engaged in commerce within the meaning of Section 2(6)(7) of the Act.

6. Admit the allegations of Paragraphs IV and V of said complaint.

7. Deny the allegations of Paragraph VI of said complaint.

8. Admit the allegations of Paragraph VII of said complaint.

9. Deny the allegations of Paragraphs VIII, IX, X, XI (designated IX in said complaint), XII and XIII of said complaint.

Dated at Albany, New York, this 10th day of May, 1974.

MC GINN, MULDERRY AND BUCKLEY
90 State Street
Albany, New York 12207

ALFRED C. FURELLO
451 State Street
Albany, New York 12210

Attorneys for Respondents

By /s/ Arthur F. McGinn, Jr.
Arthur F. McGinn, Jr.

I hereby certify that I have this day served a copy of the foregoing answer upon each of the individual parties named above by placing a copy of the same in the United States mail postage prepaid addressed to each of them at the addresses provided by the Board.

/s/ Arthur F. McGinn, Jr.
Arthur F. McGinn, Jr.

MAY [illegible] 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

JAMES K. STERRITT, INC. AND CONCRETE HAULERS, INC.

and

✓ ALLEN FINCH, AN INDIVIDUAL — Case No. 3-CA-5580-1

and

ALBERT QUICK, SR., AN INDIVIDUAL — Case No. 3-CA-5580-2

and

FRANK K. RUHNKE, AN INDIVIDUAL — Case No. 3-CA-5580-3

and

✓ THOMAS F. MONTEVERDE, JR., AN INDIVIDUAL — Case No. 3-CA-5580-4

and

ROBERT QUICK, AN INDIVIDUAL — Case No. 3-CA-5580-5

and

✓ EDWARD JORDAN, JR., AN INDIVIDUAL — Case No. 3-CA-5580-6

and

PAUL D. OVERBAUGH, AN INDIVIDUAL — Case No. 3-CA-5580-7

NOTICE OF INTENTION TO AMEND CONSOLIDATED COMPLAINT

PLEASE TAKE NOTICE that at the hearing on June 4, 1974, in the above-entitled matters, the undersigned will move to amend the Consolidated Complaint in the following respects:

To add to paragraph VI the following subparagraphs:

(c) On or about early September, 1973, Respondent, by its agent and supervisor, James K. Sterritt, urged and encouraged its employees to by-pass the Union and establish their own union.

(d) On or about late January, 1974, Respondent, by its supervisor and agent, James K. Sterritt, bargained directly with its employees concerning rates of pay, wages, hours of employment and other terms and conditions of employment

notwithstanding the Union was the duly recognized representative of the employees.

To change the paragraph number following paragraph X to read "XI" rather than "IX."

DATED at Buffalo, New York, this 28th day of May, 1974.

Respectfully submitted,

John Jay Matchulat

JOHN JAY MATCHULAT
Counsel for the General Counsel
National Labor Relations Board
Third Region
Federal Building - Ninth Floor
111 West Huron Street
Buffalo, New York 14202

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

JAMES K. STERRITT, INC. and
CONCRETE HAULERS, INC.,
Respondents

-and-

CASE NO. 3-CA-5580-1-7

FINCH, QUICK, RUHNKE, MONTEVERDE,
QUICK, JORDAN and OVERBAUGH,
Charging Party.

MOTION TO CORRECT
THE OFFICIAL REPORT OF PROCEEDINGS

Respondents, by their attorneys, McGinn, Mulderry and Buckley, and Alfred C. Purillo, move that the Administrative Law Judge enter an order correcting the Official Report of Proceedings in this case as follows:

Page 4, line 22 - The Zip Code should be 12207. In addition, the first Zip Code on Page 2 should be 12207 and the second should be 12203.

Page 527, line 11 - The term "swinging" should be changed to "slinging."

Dated at Albany, New York, this 12th day of July, 1974.

Respectfully submitted,

Arthur F. McGinn, Jr., for
MC GINN, MULDERRY AND BUCKLEY
Attorneys for Respondents
90 State Street
Albany, New York 12207

MJK

215 NLRB No. 143

D---9440
New Baltimore, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAMES K. STERRITT, INC. AND
CONCRETE HAULERS INC.

and

ALLEN FINCH, an Individual — Case 3-CA-5580-1

and

ALBERT QUICK, SR., an Individual — Case 3-CA-5580-2

and

FRANK K. RUHNKE, an Individual — Case 3-CA-5580-3

and

THOMAS F. MONTEVERDE, JR., an Individual — Case 3-CA-5580-4

and

ROBERT QUICK, an Individual — Case 3-CA-5580-5

and

EDWARD JORDAN, JR., an Individual — Case 3-CA-5580-6

and

PAUL D. OVERBAUGH, an Individual — Case 3-CA-5580-7

DECISION AND ORDER

On August 12, 1974, Administrative Law Judge Paul E. Weil issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

215 NLRB No. 143

D--9440

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents, James K. Sterrett, Inc., and Concrete Haulers, Inc., New Baltimore, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. DEC 16 1974

Edward B. Miller, Chairman

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

1/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

JD-547-74
Albany, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

JAMES K. STERRITT, INC. and
CONCRETE HAULERS INC.

and

ALLEN FINCH, AN INDIVIDUAL — Case No. 3-CA-5580-1

and

ALBERT QUICK, SR., AND INDIVIDUAL — Case No. 3-CA-5580-2

and

FRANK K. RUHNKE, AN INDIVIDUAL — Case No. 3-CA-5580-3

and

THOMAS F. MONTEVERDE, JR., AN INDIVIDUAL — Case No. 3-CA-5580-4

and

ROBERT QUICK, AN INDIVIDUAL — Case No. 3-CA-5580-5

and

EDWARD JORDAN, JR., AN INDIVIDUAL — Case No. 3-CA-5580-6

and

PAUL D. OVERBAUGH, AN INDIVIDUAL — Case No. 3-CA-5580-7

John J. Matchulat, Esq., of Buffalo, N. Y.,
for the General Counsel.
Arthur F. McGinn, Esq.; McGinn, Mulderry,
and Buckley, of Albany, N. Y., and
Alfred C. Purello, Esq., of Albany, N. Y.,
for the Respondent.

JD-547-74

DECISION

Statement of the Case

PAUL E. WEIL, Administrative Law Judge: On February 20, 1974, Allen Finch, Albert Quick, Sr., Frank K. Ruhnke, Thomas F. Monteverde and Robert Quick; and on February 25, Edward Jordan, Jr., and Paul D. Overbaugh filed with the Regional Director for Region 3 of the National Labor Relations Board, hereinafter called the Board, charges alleging that James K. Sterritt, Inc., hereinafter called JKS, violated Section 8(a)(1) and (3) of the Act by the termination of the named employees. These charges were amended on April 23 and April 25, alleging that JKS and Concrete Haulers Inc., hereinafter called CHI, violated Section 8(a)(3) and (1) by the termination and failure to recall the named Charging Parties. On April 30, 1974, the said Regional Director on behalf of the General Counsel of the Board consolidated the seven cases for hearing and issued a complaint alleging that JKS and CHI were the same employer and that they violated Section 8(a)(1) and (3) of the Act by the termination and failure to recall the seven named Charging Parties and additionally violated Section 8(a)(1) by various alleged threats to employees that they would lose their jobs because of their union activities. JKS and CHI, hereinafter jointly called Respondent, duly filed its answer denying the commission of any unfair labor practices. On the issues thus joined, the matter came on for hearing before me on June 4, 5 and 6, June 11, 1974, at Albany, New York. All parties were present, Respondent and General Counsel were represented by counsel, all parties had an opportunity to call and examine witnesses and to adduce relevant and material evidence. At the close of the hearing all parties waived oral argument. Briefs have been received from the General Counsel and Respondent.

Upon the entire record herein and in consideration of the briefs, I make the following:

Findings of Fact

I. The Business of Respondent

James K. Sterritt is the principal operating officer of JKS, CHI and of Sterritt Trucking Inc., hereinafter called STI. Mr. Sterritt is the president of JKS and STI and the general manager of CHI. He has effective control over all the stock in all three corporations. STI has interstate and intrastate operating authorities as a carrier which are possessed by neither JKS or CHI. In the year prior to January 31, 1974, JKS performed transportation services valued in excess of $50,000 for Span-Crete Northeast, an enterprise which itself annually ships goods valued in excess of $50,000 directly to States of the United States,

other than the State of New York, where it is located. The services furnished by JKS are furnished pursuant to the authority held by STI which has no employees and itself performs no operations. On January 31, 1974, JKS ceased operations and the following day all the operations theretofore conducted by JKS were conducted by CHI, which arrangement has continued at least to the point of the hearing. All payments from Span-Crete for the services rendered by Sterritt's enterprises are made through STI which prior to February 1, 1974, turned over all of the money to JKS and since February 1, 1974, to CHI. Sterritt throughout this period has been the sole operating authority of both JKS and CHI. The operations were conducted for the same customer using the same equipment out of the same terminals and using, with the exception of the Charging Parties herein, the same personnel. I find that JKS, STI and CHI are all together a single employer within the meaning of the Act and that CHI is an alter ego of JKS. I find further as will be set forth below that CHI was formed and implemented for the purpose of avoiding the effect of a contract negotiated between JKS and Local 294 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Respondent is and at all times relevant hereto has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Background

At all times relevant hereto James K. Sterritt has had contractual relationships with Span-Crete Northeast and other enterprises engaged in the construction and sale of prestressed concrete building materials, pursuant to which Sterritt's enterprises shipped the products of Span-Crete and others within the State of New York and to states other than the State of New York. 1/ The

1/ The record reveals that the Sterritt enterprises carried a substantial portion of its business to states other than the State of New York.

operating authority required by state and Federal law resided in STI which apparently at this time exists only for the purpose of holding the operating authority and operates through the other corporations. STI had no employees during the periods material to this case but exists only on paper. Payments by Span-Crete were made exclusively to STI and turned over by STI prior to February 1 to JKS which owned the equipment and hired the drivers who did the work.

Prior to April 1973, Sterritt's drivers occasionally had trouble delivering to jobs organized by the Union. Sterritt arranged to have union cards issued to certain of his drivers. Thereafter when deliveries had to be made at a union job the drivers with union cards were dispatched. There was at this time however no union contract in existence between Sterritt and the Union.

In April 1973, Sterritt's employees under the leadership of Robert Quick and others decided to seek union representation. On or about April 9, Charging Parties Monteverde, Robert Quick and Overbaugh and another employee, Ronald Misetich, obtained authorization cards from Local 294, signed them and solicited signatures from other employees. On April 11 the Union demanded recognition from Sterritt. On May 6, at 11 p.m., William Mackey, a representative of the Union, telephoned Sterritt and told him that a strike would commence at midnight because of his failure to reply to the demand for recognition. Sterritt agreed to meet at the termin[illegible] at midnight.

When Sterritt reached his terminal he found Robert Quick, Monteverde, Misetich, Rippinger, Walters Peters, Jr., and Sr., and a mechanic, Thomas Clark, prepared to picket. Sterritt met with Mackey and agreed to recognize the Union and Mackey sent the men who were present home stating there would be no strike. After th[illegible] men went home, Sterritt who was annoyed and distressed by the incident dispatched several loads, that were to have gone out the following morning. One of them was to have been driven by Robert Quick who was present, prepared to picket and had gone back home.

When Robert Quick returned in the morning he found that his load was gone, and after consulting with other employees who arrived to go to work, some of whose loads were also gone, called the Union and was told to raise a picket line. This he did and all the Charging Parties took part in the picketing as well as certain other employees. Employees Frank Barger, Walter Martin, Robert Van Heusen, Frank Mausolf and Bruce Ballinger continued working. At the end of 5 days of strike, Sterritt signed a recognition agreement with the Union and the employees went back to work.

Commencing shortly thereafter and until November, Sterritt negotiated with the Union for a contract. During the negotiations he verbally agreed to pay whatever was negotiated retroactively to the employees employed before August 1, 1973. On September 14, according to the testimony of Robert Quick which I credit, Quick asked Sterritt how the negotiations were going and said that he had heard that the Company was going to close down. Sterritt said that the negotiations were not coming very well and that he was going to close the place down until they got a contract straightened out. The following Monday, Tuesday and part of Wednesday no dispatches of Sterritt's employees were made and the work was performed by another contractor, Dallas and Mavis. Nicholas Robilletto, the Union's business agent, complained to Span-Crete that Sterritt had locked out his employees and demanded that Sterritt's employees again be used. Accordingly starting sometime the following Wednesday, Sterritt's employees resumed hauling for Span-Crete. After this incident Sterritt no longer took an active part in the negotiations which were handled by representatives of Span-Crete on his behalf. On or about November 19, 1973, the Union forwarded a draft of the contract through Span-Crete to Sterritt. Sterritt went over the draft and had it retyped to reflect certain date changes. He signed the retyped draft and sent it to the Union and thereafter changed the wage structure to that contained in the new contract. He also began making contributions to the health and welfare and pension funds, and enforced a requirement that the drivers who had not been informed of loads prior to 4 p.m., of the preceding day were to telephone Respondent for assignments or to ascertain whether they had assignments. The drivers in their turn commencing on or about November 19 commenced dealing with Sterritt largely through Robert Quick who became the steward for the Union.

During the time between September and December 1973, the Union kept telling the employees that they were going to receive a retroactive payment in the amount of $160 from Sterritt and that they would receive backpay for the 2½ days that Dallas-Mavis performed their work. Thirteen employees would receive the $160 payment, apparently only seven or eight were to have received pay for the Dallas-Mavis incident based on the number of loads hauled by Dallas-Mavis during that period.

In early November, Sterritt approached Robert Quick and asked him if he would refuse the $160 retroactive pay. Quick said he would do so if it would help straighten out the contract and Sterritt asked Quick what the other employees would do. Quick met with a number of drivers and talked it over, they decided that they had a right to the money and would accept it. At this time Sterritt was under pressure from Span-Crete to pay the money. Finally on or about November 26, 1973, Blosser, the president of Span-Crete, told Sterritt

that if he did not pay the retroactive pay Span-Crete would withhold its payments for the work done by Sterritt's enterprises. Blosser also told Sterritt to pay the backpay to the drivers who were displaced by the Dallas-Mavis incident. On November 26 Sterritt instructed his office girl to prepare retroactive paychecks for the 13 drivers who were employed prior to August 1, namely Peter Whipper, who had been and was at that time largely operating as the terminal manager and dispatcher, Charging Parties Finch, Quick, Sr., Monteverde, Robert Quick, Jordan, Overbaugh and Ruhnke as well as employees Gerow, Meo, Martin, Van Heusen and Mausolf. Sterritt also told his clerical employee, Mrs. Roberts to prepare the checks eminating from the Dallas-Mavis incident for Whipper, Robert Quick, Monteverde, Jordan, Finch, Rippinger, Overbaugh and Meo. Sterritt told Mrs. Roberts at the time that the men would give the checks back.

In early December 1973, Monteverde inquired of Sterritt when he would receive his retroactive pay. Sterritt told him that the money was coming out of his own pocket contrary to what the Union had told Monteverde and argued that Monteverde should not accept it, he made this position clear to all of his employees. Later in early December Finch, Overbaugh, Quick, Sr., Ruhnke, Rippinger, Jordan, Monteverde and Robert Quick all received and accepted the retroactive pay. Before he paid them, Sterritt spoke with Ruhnke, Overbaugh, Finch and Robert Quick and told them that their taking the money would put him in a bind and that he was paying out his own sweat and blood because the money was not going to be paid by Span-Crete as the Union had told the employees. He told them to talk it over and if they wanted the money they should come individually into his office and sign for it. Robert Quick led the way, accepted the checks and signed a receipt. He was followed by the other three employees at that time. Later other employees received their checks. Peter Whipper, Bruce Meo and Walter Peters, Sr., all declined to accept their checks. Accordingly only the seven Charging Parties and Rippinger accepted the $160 retroactive payment.

In order to meet the increased costs engendered by the contract which Span-Crete's agents had negotiated for him, Sterritt demanded that Span-Crete give him an increased tariff or rate of payment. Accordingly as of the time that Sterritt signed the contract, his tariff from Span-Crete was increased by 10 percent. He had theretofore agreed with Span-Crete for a 12½ percent increase to be effective the first of January. In December Sterritt received a letter from Blosser, Span-Crete's president suggesting that his rate structure was too high and urging him to reduce it in some way. He wrote back to Blosser that he had in mind various steps by which to do this but that under the union contract his costs were extraordinarily high. At about the same time Sterritt took steps to organize CHI, using his accountant, Bevier to effect this purpose. Also some time in December Sterritt caused application blanks to be printed bearing the corporate name of CHI.

CHI was incorporated in the State of Delaware on December 31, 1973.

On December 14, 1973, Sterritt told his clerical employee, Mrs. Roberts that he was going out of business and that she should prepare a notice that as of January 31, 1974, JKS would be going out of business and all drivers would be terminated. This notice remained posted for only 1 day. Robert Quick called Nick Robillotto of Local 294 and told him of the notice, Robillotto told him to wait and see what happened. Quick also asked Sterritt whether the notice was true and Sterritt answered that it was and told him "whether you guys know it or not, when you accepted the $160, it was the turning point on the job." Robert Quick asked whether he could continue working if he could find work for one of Sterritt's trucks. Sterritt told him that it was time that Sterritt and Quick parted company. Sterritt told Quick that he did not know or care who would be hauling for Span-Crete after January 31, 1974. Monteverde, thinking that Sterritt might have a new corporation, in late December asked for an application; Sterritt told Monteverde that he was no longer included in Sterritt's future plans and that Monteverde would receive no application from any corporation in which Sterritt was involved. Rippinger quit in December.

Commencing in late December the amount of work available decreased and Sterritt commenced laying off his employees in seniority order. Robert Quick, first in seniority was the last laid off, on January 25. When Finch was laid off Sterritt recommended that he should put in an application with Hudson Valley Cement, another employer who had in the past used some of Sterritt's equipment. Finch asked who was going to haul for Span-Crete, and Sterritt replied that he did not know but stated that he could not live with the union contract.

Sometime in mid-January, Whipper no longer appeared as an employee of JKS. Sterritt caused a notice to be posted that Whipper was no longer employed by JKS and that the employees should no longer call him for instructions or dispatches. Whipper, after taking a vacation, commenced, at a garage in another terminal, to sand the panels on the trucks which had Sterritt's name painted on them and to repaint them with the name, Concrete Haulers, Inc. By the end of January he had repainted and delivered to Sterritt's main terminal six trucks bearing the new designation. By this time all of the employees who filed charges were laid off and none had occasion to see any of the trucks with the CHI name painted on them.

Sterritt never made a public announcement that CHI was taking over the JKS hauling for Span-Crete, however apparently in December he commenced recruiting a force of drivers to work for CHI. He first recruited Whipper, who testified that in the first half of December he agreed to drive for Sterritt and that he signed an application blank on December 13. I do not believe this testimony. On the application

blank which is in evidence, the date December 13 appears in one place, December 23 in another and the December 23 date obviously was changed from December 13. However in yet a third place on the application, Whipper shows himself to have been laid off on December 28 from JKS. Applications signed by employees Walter Woods, Stephen Woods, Louis Perrine, Peter Decker, Walter Martin and Richard Alte, all bear the date January 24, Gerow, Mausolf, Van Heusen and Meo all signed applications bearing dates after January 24. 2/

On February 1 or as soon thereafter as work was available CHI started operating with former employees Whipper, Mausolf, Gerow, Meo, Van Heusen, Martin, Alte, Steven Wood, Walter Wood and Peter Decker in that seniority order. Seniority was obviously not based on the date on which they allegedly signed applications but appears to be in accordance with their seniority while employed by JKS. At some time in late January or early February these employees met with Sterritt and agreed on a new wage structure of $5.25 per hour plus 15 cents a mile. This wage structure was still in effect at the time of the hearing. Later Whipper contacted the secretary of the Union and told him that the men had put together a new package and wanted the Union to get them a contract. The secretary declined to act but said that he would report to Robillotto. Later Whipper called on Finch and asked him to go with him to the Union to attempt to persuade them to accept the men's wage package, Finch declined to do so pointing out that he was on layoff and Whipper told him that he could be employed with the new corporation if he would assist Whipper. Finch said that he was not the union steward and gave as his opinion that there was a successor clause in the contract signed on November 19 which covers the situation. Later in February, Whipper reached Robillotto and asked him to execute a new agreement on these terms but Robillotto refused.

In the middle of February Robert Quick and the other Charging Parties, having become aware of the fact that Sterritt was now operating under the CHI name, went to the union hall where they met with Mike Robillotto, the son of Nick Robillotto. Mike Robillotto is an assistant business agent for the Local. Mike Robillotto advised them to file charges with the National Labor Relations Board because they had not been employed by CHI.

Apparently late in February Nick Robillotto returned from his vacation and was apprised of the developments with Sterritt's corporations. He got in touch with Sterritt who assured him that he was

2/ Meo testified that he received an application about January 25. No one seems to know what happened to the application and he signed a new one apparently in anticipation of the hearing and backdated it to January 25. No evidence of the actual dates on which the applications were filled out and signed appears in the record.

prepared to sign a contract. Robillotto told Sterritt to prepare a seniority list and a list of the changes he desired in the contract and told him that he would meet with the employees. Thereupon all of the employees were called to the union hall for a meeting. When six of the seven Charging Parties 3/ attended the meeting, they were asked by Nick Robillotto to leave. They left the hall and were getting into their cars when Mike Robillotto and another union agent called them back in to the meeting. Robillotto went over the seniority list and was informed by the Charging Parties where their names should appear on the list. Robert Quick was first on the list. When Whipper's name was reached, the second man in seniority, Finch pointed out that Whipper had quit JKS and accordingly had lost his seniority and must go to the bottom of the list. Robillotto agreed, although he assured Whipper that if he wanted to file a grievance he would assist him. At this point Whipper left the meeting. The remaining employees continued and on the list of employees submitted by Sterritt, Robillotto wrote the numbers designating their respective positions on the complete seniority list. As the General Counsel points out, Robillotto in effect merged the pre-February 1 seniority list with the post-February 1 seniority list.

Robillotto then read off the wage proposal of $5.25 and 15 cents a mile. Robert Quick pointed out that this was only 25 cents more than they were making before the Union came into the picture and Robillotto changed the $5.25 to $5.50 and the 15 cents to 16 cents per mile. Toward the end of the meeting Robillotto called Sterritt by telephone and informed him that he had the employees all present and, in effect, that they had settled their differences. He suggested that Sterritt meet with the employees in an hour and Sterrit agreed. At the close of his conversation with Sterritt, Robillotto turned from the telephone and asked the Charging Parties if the men were going to withdraw the charges. No one answered but Robillotto said into the telephone that the charges would be dropped. Robillotto ran off a number of photocopies of the seniority list as he had changed it and of the contract changes. He gave a number of employees each a copy and sent them on their way to Sterritt's office. The six Charging Parties who were present went off together and agreed to meet and have a cup of coffee en route to Sterritt's office. When they proceeded to Sterritt's office they found the automobiles of the other employees parked in the parking lot and all the doors to the terminal were locked. They saw through the window of Sterritt's office that there was a group of men talking to Sterritt, however shortly thereafter the window curtains were pulled and except for someone occasionally moving the curtain aside and peeking through, they saw no other action. They pounded on the door but there was no response.

3/ Overbaugh was not present.

Whipper testified that after he left the union meeting he went to Sterritt's garage and when the other employees showed up he and they met with Sterritt. When the automobiles containing the striking employees arrived he locked the door so that they could not get in. This was done with Sterritt's approval. The employees other than the Charging Parties indicated to Sterritt that they were not in accordance with the seniority list sent to him by Robillotto and some of them apparently told Sterritt that if the Charging Parties came back to work they would be out of a job. They indicated considerable anger over the situation. Sterritt met with them for over an hour. He testified that he was aware that the other men were outside but saw no reason to meet with the two groups at the same time since there was obvious animosity between them.

The Charging Parties having failed to gain admission drove to the nearest public telephone where Jordan put in a call to Sterritt's office. The telephone was answered by Whipper who said that he would call Sterritt to the telephone and put the call on hold. Jordan held the telephone for 12 minutes and then since no one came on the line hung up.

According to the testimony of Sterritt, after the meeting was over, as the men were milling around, he went to the bathroom and when he came out of the bathroom he was told by Whipper that Jordan was on the telephone; when he asked Whipper to find out if Jordan was still there Whipper told him that he had hung up. Whatever the situation was, it is clear that Sterritt refused to meet with the Charging Parties at this time.

After the meeting with the employees, Sterritt called Robert Quick and told him to have the men who filed the charges meet with him at 2 p.m., the following day, Sunday. Quick called the others and relayed Sterritt's message. However, the following day at 9:30 in the morning Sterritt called Finch and asked him to meet with him as Finch was the only one he could talk to without getting mad. When Finch arrived, Sterritt locked the door and talked to Finch about the March 9 meeting. Sterritt said that he would have to get together with Robillotto before he put the Charging Parties back to work and asked Finch to call the men to tell them that the meeting was canceled. Finch declined to do so, whereupon Sterritt's wife called Robert Quick and told him that the meeting was canceled and that Sterritt would call Quick later. Sterritt never called Quick.

On March 12, Robert Quick called Robillotto and told him that he was not working and what had happened after the March 9 meeting. Robillotto said he would call Quick back and in about 30 minutes told Quick that he had called Span-Crete and told them to stop loads being hauled by Sterritt drivers until the Charging Parties were put back to work. However 20 minutes later Robillotto again called Quick and told

him that since the charges had not been dropped he could not stop Sterritt from hauling Span-Crete's work and that the Labor Board would have to handle the case. Quick pointed out that the charges had not been dropped because the men were not put back to work on March 10, but this apparently made no difference to Robillotto. The men have never been returned to work.

Discussion and Conclusions

The General Counsel contends that the failure of Sterritt to employ the seven Charging Parties resulted from their union activity and especially from the fact that they accepted the $160 retroactive pay negotiated on their behalf by the Union. Respondent contends that CHI was a new corporation putting together a new employee list and it had no obligation to the Charging Parties to hire them. Respondent contends that inasmuch as none of the Charging Parties have ever filed applications Respondent was under no duty to seek them out and put them to work, and accordingly cannot be charged with an unfair labor practice for its failure to do so.

I conclude that the refusal of Respondent to continue the employment of the seven Charging Parties is violative of Section 8(a)(3) and (1) of the Act. Respondent's defense is somewhat simplistic. I have found that CHI is the "alter ego" of JKS, indeed it is nothing but a continuation of the same enterprise with the name changed, clearly only for the purpose of avoiding the effects of the contract signed on November 19, 1973. There is no evidence that any of the seven Charging Parties were ever informed of the existence of the new corporation by Sterritt or anyone acting on his behalf. On the contrary every attempt was made to put the new corporation into operation without disclosing its existence to those employees. Thus when various of the Charging Parties asked who was going to handle the Span-Crete trucking, Sterritt uniformly answered that he did not know and in one case said he did not care. When one of the seven asked for an application, Sterritt denied that there was anything to apply to. Sterritt made no contact with the Union as the representative of his employees until after he had agreed with his new employees on the terms and conditions under which they would work and was operating under these terms. Respondent contends that CHI is a successor enterprise and that it has a right to select employees on any basis it chooses. The facts do not bear it out. Clearly the new corporation, in this frame of reference, is no more than a subterfuge, adopted by Respondent to avoid the terms of the agreement it entered into with the Union and utilized by the Respondent to divest itself of the employees whose strong union adherence and whose insistence on the retroactive pay negotiated on their behalf by the Union was seen by Sterritt as a personal affront.

When Robert Quick asked Sterritt whether he was indeed closing down, Sterritt said that he was and said "whether you guys know it or not, when you accepted the $160 it was the turning point in the job." When Monteverde asked for an application in late December, Sterritt told him that he was no longer included in his future plans and Monteverde would receive no application from any corporation in which Sterritt was involved. In January Sterritt told Robert Quick "you sure put a lot of people out of work this time . . . you and your union activities." After Sterritt posted the notice that he was going out of business, Finch discussed with him who was going to haul for Span-Crete, he told him he did not know and at this time he also said he could not live with the contract, the rates were too high. Unquestionably he was referring to the contract with the Union. In May 1973, Monteverde overheard Sterritt talking to a person whom Monteverde could not identify and say that he would go out of business before he would go union. During the summer of 1973, Sterritt told Overbaugh and Jordan that as far as he was concerned the negotiations for a contract would take forever, that he would not bend and lean to come to an agreement and he said that people were not going to tell him how to run his business.

The above incidents as well as others reveal not only the depth of Sterritt's animosity toward the Union but seriously impair the position of Respondent that in fact Sterritt wanted his drivers organized and preferred to operate as a union shop. On the record as a whole it is clear that Sterritt fought the Union until his chief customer, Span-Crete, made him realize that in order to handle their product he would have to get along with the Union. He left it to Span-Crete to negotiate a contract for him and then determined that he could not live with the contract. His immediate reaction then was to set up CHI and transfer his entire business to the new corporation believing that he could thus get a new contract. Whether he did this before or after conferring with Robillotto is not known but Robillotto, after some initial adverse reaction, went along with the deal until he became aware that the seven men remaining of the eight who accepted the retroactive pay in December had been ousted from their jobs by the changeover. Even then the Union was not about to support the seven with any show of strength but left it to the Charging Parties to proceed through the Labor Board, apparently out of the pique of Nick Robillotto that they had filed charges rather than fighting their battle through the Union. 4/

4/ The fact that Nick Robillotto's son Mike advised them to file charges apparently made no difference to Nick Robillotto who administered a tongue lashing to his son in the presence of union members for giving advice to the Charging Parties.

I conclude that Respondent by the action set forth above discriminated against the seven Charging Parties because of their union activities and especially because they accepted the retroactive pay negotiated on their behalf by the Union thereby discouraging membership in the Union and activities on its behalf in violation of Section 8(a)(3) and (1) of the Act.

By an amendment to the complaint at the hearing, the General Counsel alleged that by an incident that took place in early September 1973, Sterritt urged and encouraged its employees to bypass the Union and establish their own union. The record reveals that in early September 1973, Rippinger and a number of other employees were seated in the terminal waiting for loads. Sterritt called Rippinger into his office and spent about an hour talking to him. When Rippinger came out of Sterritt's office he addressed himself to the other employees and asked them what they thought of starting a company union. The other employees present, Jordan and Monteverde, were not at all enthused at the idea. Rippinger told Monteverde that a meeting would be held that night; shortly thereafter a notice was posted calling the drivers to a meeting at 7 o'clock. About 15 drivers attended the meeting, excluding Jordan and Monteverde who were on a run and had not returned. The meeting started about 7:30 and lasted for about an hour and a half. When the employees arrived they found Sterritt present in the meeting room. Ruhnke asked Sterritt why he was there and suggested that the drivers would not speak up if the boss is around. Sterritt said he would leave if the employees wanted him to but nobody spoke up to ask him to leave. Rippinger then suggested forming a company union, saying that he had discussed the proposal with Sterritt. The employees discussed the matter. Finch, Overbaugh and Ruhnke spoke up to oppose the idea. Sterritt informed the employees that he could obtain hospitalization and retirement for them at less expensive rates than that obtainable through the Union and that he would contact his lawyer with regard how to go about forming a union. The meeting apparently broke up without any action being taken.

When Monteverde and Jordan returned immediately after the meeting broke up Rippinger approached them and told them that the men were angry with him because of the meeting but that it was Sterritt's idea and not his. On a later occasion Rippinger told Monteverde that that would be the last time he would stick his neck out for the men, Sterritt got him in to the matter and now the men were angry with him.

Respondent contends that the General Counsel did not prove his allegation and that indeed only Rippinger appears to have attempted to form a company union. Respondent points out that the General Counsel did not call Rippinger to support the allegation and accordingly I should presume that Rippinger's testimony would not have supported it. The only evidence on the record that a company union was ever discussed at any

other time was in the testimony of Whipper whom I found unreliable in other respects and do not credit in this respect. Whipper testified that Rippinger at various times had discussed company unions with him prior to the meeting in early September. I find that the facts set forth above, accepting Monteverde and Jordan's testimony as to the statements made by Rippinger only to the fact that the statements were made and not the truth of the statements, raises the inference that the impetus to form a company union and the exploration of it derived from Sterritt. In any event Sterritt's presence at the meeting of the employees, even though it was suggested he should not be present, and his participation in the discussion with the suggestion, first, that he could secure the benefits for the men cheaper than the Union and, second, that he would provide the legal advice necessary to setting up a company union, adopted and furthered Rippinger's suggestion. I find that Sterritt thereby interfered with, coerced and restrained his employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

By another amendment to the complaint made at the opening of the hearing, General Counsel contends that in late January the Respondent, by Sterritt, bargained directly with the employees concerning rates of pay, wages, hours of employment, etc., in violation of Section 8(a)(1) of the Act. This action on Sterritt's part is admitted. He testified that he met with the men when he set up the new corporation and that they reached agreement on the wages and hours that are currently in force. It was not until later, in early February that any attempt was made to inform the Union first that CHI was in existence and second that the employees and Sterritt had agreed on new rates lower than those embodied in the contract that Sterritt had signed on November 19, 1973. I have found that the employing enterprise continued throughout the period relevant to this case, accordingly the employees were at all times represented by the Union and by negotiating directly with the employees and presenting to the Union an accomplished fact, Respondent interfered with, coerced and restrained its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

The General Counsel alleges that Respondent violated Section 8(a)(1) by Sterritt's statement to Overbaugh when he gave him his retroactive paycheck that there would be a consequence, although Overbaugh himself would not suffer from the consequence. I find that the statement is too ambiguous to raise an inference that Sterritt thereby threatened Overbaugh in terms of Section 8(a)(1) of the Act and I recommend that the complaint be dismissed insofar as this statement is alleged to be a violation. General Counsel also contends that Sterritt's statement to Robert Quick that when the men accepted the money that was the turning point of the job and his statement in January that Quick's union activities had put a lot of people out of work violated Section 8(a)(1) of the Act by restraining and interfering with Quick's activities. I agree

that these statements by Sterritt interfered with, restrained and coerced his employees in the exercise of their Section 7 rights and constitute violations of Section 8(a)(1) of the Act.

Respondent contends that no violation is present because Local 294 consented to Sterritt's actions. Respondent contends that the General Counsel failed to establish that "294's attempts to have Mr. Sterritt reinstate these seven men to their former seniority positions were rejected by Mr. Sterritt" but that on the contrary Sterritt agreed to reestablish the old seniority list but after the March 9 meeting Sterritt was faced with an impossible situation and he chose to "sit it out" with the majority of the men. Respondent finds comfort in the fact that at this point Robillotto did not continue to pressure Sterritt because he thought that the men who brought the charges failed to live up to a promise to withdraw them. I find this argument misses the point entirely. The Union did not agree that Respondent could refuse to reinstate the Charging Parties. On the contrary Robillotto in his March 9 meeting with the employees did his best to assure that they would go back to work. When Sterritt chose "to sit it out" with the majority of the employees, all of whom would be lowered by seven positions on the seniority list by the reinstatement of the Charging Parties, Robillotto refused to use union pressure leaving it to the Charging Parties to work through the Labor Board. While it might well be argued that this is something less than the type of representation the men might expect from this strong labor organization it does not constitute an acquiesence or agreement by the Union that the seniority list should not include the Charging Parties. However, even if the facts supported Respondent's argument in this respect, which I find they do not, they provide Respondent no defense. Even if the Union had "sold out" the employees, Respondent's action in refusing to permit them to work is no less violative.

Finally Respondent's contention that it had no duty to hire the seven Charging Parties because they never perfected an application completely ignores the facts. We have seen above that Respondent through Sterritt made every effort to prevent the Charging Parties from finding out that it was going to continue the business under a new name. In addition after the Union finally was stirred up to do something about the situation, Respondent locked the door in the face of the seven men when they came to its plant, with the agreement of the Union, to fill out the necessary forms and go back to work. At this point Respondent admittedly deliberately chose not to put the men back to work but to "ride it out" with the employees of lower seniority who were agreeable to the reduced terms and conditions which they had negotiated privately with Sterritt. This contention of Respondent has no validity and I reject it.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. James K. Sterritt, Inc., and Concrete Haulers Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By urging and encouraging its employees to bypass the Union and establish their own union; by bargaining directly with its employees concerning rates of pay, wages, hours of employment and other terms and conditions of employment notwithstanding the Union was the duly recognized representative of the employees; and by telling its employees that their union activities would put a lot of employees out of work, Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. By failing and refusing to call back after a layoff, Allen Finch, Albert Quick, Sr., Frank K. Ruhnke, Thomas F. Monteverde, Jr., Robert Quick, Edward Jordan, Jr., and Paul D. Overbaugh, Respondent discriminated with regard to the hire and tenure and terms and conditions of employment of its employees thereby discouraging membership in a labor organization, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has refused to rehire the seven Charging Parties herein, I shall recommend that Respondent offer them reinstatement to their former jobs, placing them on the seniority list in the same

positions they held thereon before their layoff in December 1973 or January 1974, or if those jobs no longer exist, to substantially equivalent jobs, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of sums of money equal to those which they normally would have earned from the date on which they would have resumed driving after February 1 in accordance with the seniority they held prior to February 1, 1974, to the date of a valid offer of reinstatement less net earnings during such period, to be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289, and with interest as described in Isis Plumbing & Heating Co., 138 NLRB 716.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 5/

ORDER

Respondent, James K. Sterritt, Inc., and Concrete Haulers Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership and activities on behalf of Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by discriminating in regard to the wages, hours and working conditions of their employees because of their activities on behalf of said labor organization.

(b) Urging and encouraging their employees to bypass the Union and establish their own union.

(c) Bargaining directly with their employees concerning rates of pay, wages, hours of employment and other terms and conditions of employment notwithstanding the Union was the duly recognized representative of the employees.

(d) Stating to the employees that the acceptance of benefits bargained for them by the above-named Union or any other labor organization would have an adverse effect on their jobs or that their union activities would put people out of work.

5/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining or coercing their employees in the exercise of their rights to self-organization, to form, join or assist any labor organization to bargain collectively through representatives of their own choosing, to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or to refrain from any or all such activities.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Offer to Alfred Finch, Albert Quick, Sr., Frank K. Ruhnke, Thomas F. Monteverde, Jr., Robert Quick, Edward Jordan, Jr., and Paul D. Overbaugh immediate and full reinstatement to their former jobs or if such jobs no longer exist to substantially equivalent jobs and make them whole in the manner set forth in the section of the Decision entitled "The Remedy."

(b) Place the names of the employees set forth in section 2(a) above on its seniority list in the position occupied by those persons prior to their layoff in December 1973 and January 1974, and afford them assignments in accordance with that seniority list.

(c) Preserve and upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its terminals in New York State, copies of the attached notice marked "Appendix." 6/ Copies of said notice on forms provided by the Regional Director for Region 3, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

6/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

Dated at Washington, D. C.

Paul E. Weil
Administrative Law Judge

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

ID-547-74

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trail at which all sides had the opportunity to present their evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and to keep our word about what we say in this notice.

The Act gives all employees these rights:

To engage in self-organization
To form, join or help unions
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any and all these things.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT discourage membership in Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by discriminatorily refusing to reinstate laid off employees or by discriminating against employees because of their activities on behalf of the above-named Union.

WE WILL reinstate the following employees to the jobs they held before February 1, 1974, in accordance with the seniority they held prior to their layoff in December 1973 and January 1974, and WE WILL make them whole for any loss of pay they have suffered as a result of our discrimination against them by payment to each of them of the amount of money they lost as a result of our action.

Allen Finch
Albert Quick
Frank K. Ruhnke
Thomas F. Monteverde, Jr.
Robert Quick
Edward Jordan, Jr.
Paul D. Overbaugh

WE WILL NOT urge and encourage our employees to bypass the Union and establish their own union.

WE WILL NOT bargain directly with our employees concerning rates of pay, wages, hours of employment and other terms and conditions of employment notwithstanding the Union is the only duly authorized representative of our employees.

JAMES K. STERRITT, INC and
CONCRETE HAULERS INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor - Federal Building, 111 - W Huron Street, Buffalo, N. Y. 14202 Telephone (716) 842-3100

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

JAMES K. STERRITT, INC. and
CONCRETE HAULERS, INC.,
Respondents

-and-

Case No. 3-CA-5580-1-7

FINCH, QUICK, RUHNKE, MONTEVERDE,
QUICK, JORDAN and OVERBAUGH,
Charging Party

RESPONDENTS' EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondents take exceptions to the decision of the Administrative Law Judge with respect to the following questions of procedure, fact, law and policy and herewith submit their brief in support of those exceptions:

I. JURISDICTION

Respondents take exceptions to the following findings of fact and conclusions of law made by the Administrative Law Judge and policies and procedures followed by him:

(a) "In the year prior to January 31, 1974, JKS performed transportation services valued in excess of $50,000 for Span-Crete Northeast . . . ." (ALJ p.2, 1.44-46)*

(b) "The services furnished by JKS are furnished pursuant to the authority held by STI which has no employees and itself performs no operations." ALJ, P.3, 1.1-3)*

*Reference to Decision of Administrative Law Judge

(c) "I find that JKS, STI and CHI are all together a single employer within the meaning of the Act and that CHI is the alter ego of JKS." (ALJ p. 3, l. 13-16)

(d) "Respondent is and at all times relevant hereto has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act." (ALJ p. 3, l. 21-23)

(e) ". . . Respondent James K. Sterritt has had contractual relationships with Span-Crete Northeast and other enterprises engaged in the construction and sale of prestressed concrete building materials pursuant to which Sterritt's enterprises shipped the products of Span-Crete and others within the State of New York and to states other than the State of New York. 1/ The operating authority required by state and Federal Law resided in STI which apparently at this time exists only for the purpose of holding the operating authority and operated through the other corporations." ALJ p.3, l. 34-39 and p. 4, l. 1-3)

(f) "The record reveals that the Sterritt enterprises carried a substantial portion of its business to states other than the State of New York." (ALJ p. 3, fn. 1)

Paragraphs II(e) and (f) of the complaint allege that respondents' businesses fall within the "instrumentalities, links and channels of interstate commerce" jurisdictional yardstick of the NLRB. General Counsel acknowledged that fact in support of his request for the production of records showing the gross revenue of Sterritt Trucking, Inc. (301)*. As the Administrative Law Judge pointed out (306), General Counsel made it clear that he wanted to show that Sterritt Trucking, Inc. is engaged in interstate commerce directly and the Administrative Law Judge advised him that

> I'm going to give you until after lunch to decide whether you're going to make that motion, which route you want to follow, because I would call to your attention a recent

*reference to the official report of this proceeding.

> Circuit Court case except that I can's recall the citation or name, where the Court says, wait a minute, you can't go both ways. So, you've got to fish or cut bait, apparently and you'd better decide which way you're going to go before you make your motion. (307)

Upon resumption of the hearing, General Counsel offered a stipulation found to be irrelevant and then abandoned the entire matter of jurisdiction (308).

We submit that General Counsel's case is fatally defective in that he has failed to prove the allegations of paragraphs II (e) and (f) of the complaint which relate to Spancrete Northeast.

Neither James K. Sterritt nor Sterritt Trucking, Inc. is a respondent in these proceedings. Respondents' answer raised the jurisdictional issue by taking the position that neither respondent did business with Span-Crete Northeast as alleged in the complaint. That issue might have been met in a timely fashion by adding respondents -- even by motion. Rather, General Counsel chose to ignore this vital discrepancy between the complaint and the proof.

The Administrative Law Judge glosses over that failure by finding that "James K. Sterritt has had contractual relationships with Span-Crete Northeast . . ." ((e) above) and by referring to "Sterritt's enterprises" ((e) above) and "Sterritt enterprises" ((f) above) and by finding that "JKS, STI and CHI are all together a single employer. . ." ((c) above). We submit that there is no indication in the record that James K. Sterritt personally did any business and the finding that STI

is an "employer" in this proceeding, without any appearance on its behalf, is procedurally defective and poor policy. The jurisdictional standard requires the showing of a direct link to interstate commerce. The fact is that only STI performed transportation services (151).

The finding that "Sterritt enterprises carred a substantial portion of its business to states other than the State of New York" ((f) above) is a completely gratuitous conclusion. There is simply no such evidence in the record (See 63 and 148). We submit that this finding is a further effort to gloss over the failure of General Counsel's proof.

II. AGREEMENTS BETWEEN RESPONDENTS AND THE UNION

Respondents take exceptions to the following findings of fact and conclusions of law made by the Administrative Law Judge:

> (a) "During the negotiations he [Sterritt] verbally agreed to pay whatever was negotiated retroactively to the employees employed before August 1, 1973." (ALJ p. 5, l. 2-4)
>
> (b) "After this incident Sterritt no longer took an active part in the negotiations which were handled by representatives of Span-Crete on his behalf." (ALJ p. 5, l. 16-18)
>
> (c) That Respondents sought to avoid "the terms of the agreement it entered into with the Union . . ." and that "retroactive pay [was] negotiated . . . by the Union . . ." (ALJ p. 11, l. 42-46, p. 13 l. 1-6)

No agreement was ever finalized with the Union. Sterritt did sign an agreement in November 1973 and did put new wages and conditions into effect on November 19, 1973. However, as late as January 9, 1974, Respondents' representative was advised by the Union that "It's being typed for errors and corrections." (529)

Retroactive pay was discussed at the negotiating session on August 30, 1973 (525). This was in the context of Respondents' proposals with respect to waiting time and the slinging of loads (526-27). The "tentative" agreement reached at that meeting and the meeting of September 13, 1973 (525) was turned down by the Union members (261) on September 14, 1973. Thereafter, the Union included retroactive pay in a written proposed agreement (613, Res. Ex. 7), Respondents deleted that proposal and the Union agreed to the deletion by not including it in a subsequent proposed agreement (613-614, Res. Ex. 8).

In the final "shake down" (the terms are used in both senses), retroactive pay was not a part of any agreement. Respondents were compelled to make payments of retroactive pay and other money because

> the Union kept telling the employees that they were going to receive a retroactive payment in the amount of $160 from Sterritt and that they would receive backpay for the 2-1/2 days that Dallas-Mavis performed their work. (ALJ p. 5, l. 31-35)

The finding that Span-Crete officials acted on behalf of Respondents in their dealings with the Union is especially offensive. In fact, Span-Crete officials acted on behalf of the Union. Robilotto (the Union's President) summoned Sterrit to a meeting on September 16, 1973 through the President of Callanan Industries which is a parent company to Span-Crete Northeast (594, 596 et seq). From that date to the March 1974 meeting between Sterritt and Robilotto, the Union used various officials of Callanan Industries and Span-Crete to communicate

with and make its position known to Sterritt: Marcell (594), Blosser (596), Fisher (602), Fitzgerald (605, Res. Ex. 5), Blosser (607, 608, 615, 620, 621) and Fitzgerald (631).

In finding Respondents' guilty of section 8(a)(1) and 8(a)(3) violations, the Administrative Law Judge identifies the union activity as the acceptance of retroactive pay allegedly negotiated by the Union (ALJ p.13, l. 1-6), conspicuously avoiding reference to the so-called "lock out" money which became an issue when another trucking company hauled for Span-Crete on September 17-19, 1973. There is absolutely no indication that Sterritt ever agreed to pay for those days on which no work was performed.

III. ALLEGED THREATS

Paragraphs VI (a) and (b) of the complaint allege that Sterritt made threats in violation of section 8(a)(1) of the Act to employees Overbaugh and Quick (8 and 9). The Administrative Law Judge recommends dismissal of the complaint with respect to Overbaugh and Respondents take exception to his finding that Sterritt's statements to Quick violated section 8(a)(1). (ALJ p. 14, l. 37-48 and p. 15, l. 1-3).

Robert Quick's testimony with respect to conversations with Sterritt "on or about early December, 1973" is at pages 232 through 237 of the transcript and there is nothing remotely resembling a threat related in that testimony. Sterritt issued checks at the insistence of

the President of Spancrete who, under union pressure, threatened to shut down and not pay Sterritt (619-21, 642-43). The employees had to be aware that Sterritt was being forced wrongly to issue the checks. Quick refers to "a big hassle going back and forth for two months" (271) and states that "At that time, there was still a doubt as to who had to pay the money, who was lying" (273).

The alleged threat set forth in paragraph 6(b) of the complaint is described by Quick at page 240 of the transcript. That telephone conversation in mid-January first dealt with Quick's failure to make a timely call for a dispatch and is then described by Quick in these words: "So, then we went on about, you know, some talk about different things." (240). Then, from those "different things" he selected, "You sure put a lot of people out of work this time." and "You and your Union activities" (240). We submit that even if such words were used, they do not constitute a "threat" that other employees would lose their jobs. Quick was the shop steward, first on the seniority list (241) who, in the same telephone conversation, indicated to Sterritt that he should have been given the job as terminal manager (256-57). He also quotes Sterritt as saying "You should have gotten Mausoff in the Union. He'd have been a good man on your side." (258). Like "eloquence," a threat exists in the man, the subject and the occasion. We submit that there was no threat given or received.

IV. ALLEGED "BY-PASSING" OF THE UNION

Respondents take exception to the findings of fact and law that they sought to "by-pass" the Union and to encourage their employees to establish their own union. (ALJ p. 14, l. 19-35 and p. 16, l. 20-29).

Sterritt testified that Rippinger "literally kept bugging me" (629) about a company union and that his reaction was that the idea was "foolish." That and his other testimony regarding that September 1973 meeting is at pages 629-30 of the transcript. We submit that Sterritt needed Local 294 and the idea of his instigating a company union is ludicrous. He was then in active negotiations with Local 294 (518-26). And why wasn't Frank Rippinger called as a witness for the General Counsel?

Sterritt did discuss new employment conditions with CHI employees. This has to be viewed in relation to the fact that Sterritt was setting up a different operation for the purpose of "getting out from under" the terms which Local 294 had imposed on him. At that time he knew that Local 294 would not oppose that move (624, 626). He testified that "we would still have to get some kind of an agreement with the local and which I was in favor of . . ." (624). The fact that he readily met with Robilotto in early March 1973 also demonstrates that he had no basic intent to subvert the representation status of the Union.

From July to September, Respondents' representatives took the initiative in the negotiations as detailed in testimony of James Bevier

(516-528). That testimony is completely ignored in the decision of the Administrative Law Judge.

V. FAILURE TO RECALL

Respondents take exception to the conclusions of fact and law that their failure to recall the charging parties is violative of sections 8(a)(3) and (1) of the Act. (ALJ p. 11, 1.21-46, p. 15, 1. 5-46 and p. 16, 1. 30-36).

The complaint alleges that the employment terminations (lay-offs) were violative of section 8(a)(3) but there is no finding to that effect. The original charges were limited to those terminations and the "failure to recall" was included in the amended charges. This brings us to the heart of the matter. In all of the circumstances of this case, did Sterritt have any obligation to "recall" or "reemploy" former employees?

The charges in these proceedings were filed in February 1974. Sterritt met with N. Robilotto in early March 1974 and, at Robilotto's request, prepared lists of names of employees and former employees (G.C. Ex.16) for Robilotto's use at the March 9, 1974 union meeting. The General Counsel refer. to that Exhibit 16 and the March 9th meeting as "incidents leading up to what is contended to be a refusal to recall-to rehire. . ." (emphasis added) (45). Yet, the charge alleged the refusal to recall or rehire started at the time of the lay-offs. General Counsel also stated that it would be established that "Local 294's attempts to have Mr. Sterritt reinstate these seven men to their

former seniority positions were rejected by Mr. Sterritt. . ." (12-13). Nothing of the sort was established. Sterritt agreed to reestablish his old seniority list in his meeting with N. Robilotto in early March 1974 (631). After the March 9th meeting Sterritt was faced with an impossible situation and he chose to "sit it out" with the majority of the men (637-38). It now appears that Robilotto did not continue to pressure Sterritt on this matter because he thought the men who brought the charges failed to live up to a promise to withdraw them (286-88).

This raises a serious issue. Why wasn't N. Robilotto called as a witness? His son (testimony at 22-51) obviously not a principal participant in the Sterritt-Local 294 scenario. There is not even an explanation in the record for his absence.

The charging parties thought that Local 294 and Sterritt were both making fools of them (486-87). They faulted Sterrit for locking the door (487) and he can hardly be blamed for that in the circumstances. Yet, at no time did any of the charging parties request reemployment. Again, we submit that Sterritt had no obligation to re-employ.

Sterritt opened up the new operation with this approach:

> I never called anyone. Anyone that is working for Concrete Haulers is someone that has walked in the door and asked for an application, or walked in the door and indicated that he was available for part-time work. (139)

Obviously, Sterritt was on a treacherous and desperate course in attempting to get out from under the Local 294 contract. He had no

contact with Local 294 since the September 16, 1973 meeting with Robilotto at Marcell's office (595).

Local 294 recognized the need to give Sterritt relief from the terms imposed in November 1973 (46-47). It is also clear that Local 294 consented to the changeover effected by Sterritt:

> Prior to that, Nick Robilotto told six men, when he asked them about the successor clause and their back pay, that they weren't going to get any back pay because Concrete Haulers was a completly new organization and Sterritt could hire anybody he wanted for it. (570)

Also, see testimony at pages 263 and 340.

Robert Quick raised the successor clause issue with the union before the lay-off (405). We submit that the record is clear that all of the charging parties knew, at least by the middle of January, that Sterritt had plans to open another operation with a less expensive labor cost. The charging parties did not approve of that approach and wanted to maintain prior rates and conditions (264-65, 336, 403-05). Their position resulted in a "falling out" with the union (280). From all of the evidence, it is clear that the charging parties did not apply for reinstatement because they did not agree with the change that had taken place.

This situation can be described in another manner. Sterritt's passive approach was, in effect, an offer of reemployment conditioned on acceptance of "lesser" wages and conditions to be approved by the Union. Clearly, the charging parties wanted no part of such an offer. Is

their refusal to "go along" by applying for a job with CHI to be considered activity on behalf of a Union which would support an 8(a)(3) complaint? If so, no Union would ever be able to grant relief from an impossible agreement. And here there never was any final agreement -- just the imposition of terms on Sterritt by the Union through officials of Spancrete.

Local 294 had an ironclad 8(a)(5) case against Sterritt if it chose not to consent to the relief sought and obtained by Sterritt. Obviously, the charging parties would have applauded an 8(a)(5) charge. However, its absence should not give rise to an 8(a)(3) based on their refusal to apply for jobs. This is especially true in view of Sterritt's agreement with Local 294 to reestablish the old seniority list.

WHEREFORE, Respondents petition that the Board reverse the decision of the Administrative Law Judge and dismiss the complaint.

Respectfully submitted,

Arthur F. McGinn, Jr., for
MC GINN, MULDERRY & BUCKLEY, P.C., and
ALFRED C. PURILLO
Attorneys for Respondents
90 State Street
Albany, New York 12207

Albany, New York
September 9, 1974

MJK

215 NLRB No. 143

D--9440
New Baltimore, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAMES K. STERRITT, INC. AND CONCRETE HAULERS INC.	
and	
ALLEN FINCH, an Individual	Case 3-CA-5580-1
and	
ALBERT QUICK, SR., an Individual	Case 3-CA-5580-2
and	
FRANK K. RUHNKE, an Individual	Case 3-CA-5580-3
and	
THOMAS F. MONTEVERDE, JR., an Individual	Case 3-CA-5580-4
and	
ROBERT QUICK, an Individual	Case 3-CA-5580-5
and	
EDWARD JORDAN, JR., an Individual	Case 3-CA-5580-6
and	
PAUL D. OVERBAUGH, an Individual	Case 3-CA-5580-7

DECISION AND ORDER

On August 12, 1974, Administrative Law Judge Paul E. Weil issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents, James K. Sterritt, Inc., and Concrete Haulers, Inc., New Baltimore, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. DEC 16 1974

Edward B. Miller, Chairman

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

1/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

JAN 30 1975 RECD

Albany, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAMES C. STEGMAIER, INC. and
CONCRETE MULDERS INC.

and

ALLEN FANT, AN INDIVIDUAL — Case 3-CA-6580-1

and

ALBERT QUICK, SR., AN INDIVIDUAL — Case 3-CA-6580-2

and

FRANK K. RUNCK, AN INDIVIDUAL — Case 3-CA-6580-3

and

JAMES F. MONTEVERDE, JR., AN INDIVIDUAL — Case 3-CA-6580-4

and

ROBERT QUICK, AN INDIVIDUAL — Case 3-CA-6580-5

and

EDWARD JORDAN, JR., AN INDIVIDUAL — Case 3-CA-6580-6

and

EARL D. OVERMAGH, AN INDIVIDUAL — Case 3-CA-6580-7

ORDER CORRECTING

On December 16, 1974, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding 1/ in which an inadvertent error appears.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is corrected by deleting the word "Respondents" from the third line of the last paragraph of the Order and substituting therefor "Respondent."

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., January 28, 1975.

By direction of the Board:

George A. Leet

Associate Executive Secretary

1/ 215 NLRB No. 143.